

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

IN RE:)	
)	
ADRIAN DAVID KILL,)	Case No. 01-20418-drd
)	
Debtor.)	

MEMORANDUM OPINION

The matter before this Court is the Motion of Creditor Christine Wick to Compel Debtor to Turnover Property of the Estate to the Trustee (“Motion”). Ms. Wick, who is the ex-spouse of Debtor Adrian David Kill (“Debtor”), claims to be a creditor and moves the Court for an order compelling the Debtor to turnover certain property to Janice E. Harder, the trustee (“Trustee”) in this case. Ms. Wick believes that Debtor has in his possession certain audio and video equipment which he owned and possessed at the time he filed the bankruptcy petition, which constitutes property of the estate and which Debtor failed to schedule. The Debtor opposed the Motion, at least in part, on the grounds that Ms. Wick is not a creditor of the Debtor or, alternatively, if she holds a claim against the Debtor and therefore against the estate, that she still lacks standing to prosecute a motion to compel turnover. The Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a) and (b). This is a core proceeding which this Court may hear and determine pursuant to 28 U.S.C. § 157(b)(2)(A), (E) and (O). The following constitutes my Findings of Fact and Conclusions of Law in accordance with Rules 9014(c) and 7052 of the Federal Rules of Bankruptcy Procedure. For the reasons set forth below, this Court finds that Ms. Wick has failed to demonstrate that she is a creditor or otherwise a party in interest entitled to bring the Motion. In the alternative, the Court holds that even if Ms. Wick is a creditor, she lacks standing to prosecute a motion to compel turnover as only the case trustee may

seek such relief. Accordingly, the Court will enter an order denying the Motion.

I. FACTUAL BACKGROUND

This case was originally commenced on March 21, 2001, when Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code. The docket shows the case was uneventful. The trustee filed a Report of No Distribution on May 8 and an Order of Discharge was entered on July 11, 2001. On that same date, a Final Decree closing the case was entered.

On December 10, 2003, the Trustee filed a motion to reopen the case on the grounds that information had been provided to her suggesting that the Debtor might still have in his possession assets which he owned on the date of filing and were property of the estate, but were not properly scheduled. Attached to the motion was an affidavit which had been supplied to the trustee by Ms. Wick, making allegations to that effect. Along with the motion to reopen, the trustee filed a motion to compel turnover of property of the estate and a motion for preliminary injunctive relief to prevent disposal of the property pending the determination of the motion to compel turnover. On December 16, this Court entered its Order granting the trustee's motion to reopen the case. Shortly thereafter, the Trustee withdrew her motion for a preliminary injunction, advising that Debtor's counsel had confirmed to the Trustee that the Debtor pledged not to dispose of any property pending resolution of the issues raised in the motion to compel turnover. At the Trustee's request, the hearing on the motion to compel turnover was continued pending a visit to the Debtor's premises and an examination to be scheduled pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure. On April 8, the Trustee withdrew her motion for turnover. Shortly thereafter, she filed a notice rescheduling the Rule 2004 examination of Debtor for May 18, 2004. One day after the scheduled 2004 examination, the Trustee filed a notice of intent to sell to the Debtor the estate's interest in a Panasonic AJD 700 digital camera and associated video

equipment for the sum of \$2,000. Ms. Wick filed an opposition to the proposed sale to the Debtor alleging, among other things, that the property had a value in excess of the proposed sale price as evidenced by the existence of a person willing to bid more than that for the camera and equipment. After a somewhat tortuous procedural course, the Trustee's notice of intent to sell was ultimately resolved with the entry of an order confirming the sale to a Marcus Batton for the sum of \$3,200. In the meantime, however, Ms. Wick filed the Motion now before the Court renewing the contention made in her affidavit and the Trustee's original motion to compel turnover. Between the filing of her objection to the Trustee's proposed transfer of the camera to Debtor and the filing of her Motion, Ms. Wick has apparently also conducted discovery of her own, having filed a notice of Rule 2004 examination of the Debtor and issued subpoenas on several parties for various books and records.

II. DISCUSSION

As indicated above, the Court held a hearing to resolve the threshold questions raised by Debtor as to Ms. Wick's standing to prosecute the Motion. The principal issues to be determined by the Court are: (1) whether Ms. Wick is a creditor of the estate or otherwise a party in interest; and (2) whether, even if Ms. Wick is a creditor, she has standing to prosecute a motion to compel turnover to the trustee of property of the estate or whether only a case trustee may file such a motion.

A. Whether Ms. Wick Is A Creditor

Ms. Wick claims to be a creditor, but offers no evidence as to the nature or amount of her claim. The Bankruptcy Code defines "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief." 11 U.S.C. § 101(10). The term "claim" is defined broadly and includes any right to payment (or right to an equitable remedy for breach if the

breach gives rise to a right to payment) whether fixed or contingent, liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, legal or equitable. 11 U.S.C. § 101(5).

When challenged to articulate the claim her client asserts, counsel for Ms. Wick could not identify one. Ms. Wick was previously married to Debtor. The proceeding to dissolve that marriage was not commenced until after the filing of the petition. The only evidence the Court has as to the result of that proceeding is a brief order that reads in its entirety (after declaring the dissolution of the marriage) as follows: “The Court retains jurisdiction of any claims raised by the parties to this action for which a final order has not yet been entered. No such claim was raised by either party.”¹ If Ms. Wick has some as yet unarticulated claim that might be adjudicated in the dissolution proceeding, such a claim would only arise upon the entry of an order in that proceeding and would not therefore arise at or before the time of the filing of the petition. *See, e.g., Arleaux v. Arleaux*, 210 B.R. 148, 150 (B.A.P. 8th Cir. 1997) (discharge only applies to debts that arose before filing of bankruptcy petition); *see also, In re Neier*, 45 B.R. 740 (N.D. Ohio 1985). It would for that reason not be a “claim” as defined by § 101(5) entitled to share in any distribution made in this proceeding. Ms. Wick asserted that she might, if Debtor had property that should be turned over, have a right to division of such property. Even if true, that right would not be a claim against the estate. *Cf. In re Abma*, 215 B.R. 148, 152 (Bankr. N.D. Ill. 1997) (holding if not distribution award vested at time of bankruptcy filing, debtor’s property came into estate free of claims of spouse); *cf. also, In re Palmer*, 78 B.R. 402, 406 (Bankr. E.D.N.Y. 1987). In that event, the question would be whether any such property should be set aside to her, not whether she should

¹Defendant’s Ex. 1.

share in the proceeds of the liquidation of it and other property of the estate (i.e., it would not give rise to a “right to payment”). To the extent Ms. Wick contends that she had some type of contingent claim at the time Debtor filed bankruptcy based on her status as Debtor’s spouse, there are several problems. First of all, any asserted contingent claim would have to have been determined by the dissolution court which was not done. No claim for marital property division was brought in the dissolution court by Ms. Wick at the time of dissolution nor at any time since. In fact, the dissolution court specifically noted in the dissolution decree that no claims were raised by either party. Accordingly, the Court holds that Ms. Wick has not demonstrated that she has a claim against the estate. She is, therefore, not a creditor and lacks standing on that basis to move to compel the Debtor to turn over property. She has not demonstrated or even argued that she might be a party in interest for any other reason.

B. Whether, If Ms. Wick Is A Creditor, She Has Standing To
Prosecute The Motion To Compel Turnover

Even if the Court were to find that Ms. Wick were a creditor or party in interest, she would still not have standing to prosecute the Motion. Ms. Wick seeks, pursuant to § 542(a) to compel the Debtor to turnover property that the trustee may use, sell or lease. Turnover, under that section, is to the trustee. According to § 704(1), one of the duties of the trustee is to collect and to reduce to money property of the estate. Such liquidation would be for the benefit of the estate. According to § 323(a), the trustee is the representative of the estate. It is both unnecessary and inappropriate to permit an individual creditor to purport to exercise these duties given to the trustee and to play the role assigned to the trustee in representing the estate. *Cf. Hartford Underwriters Inc. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000) (administrative claimant lacks standing to seek to surcharge secured creditor’s collateral under § 506(c); only trustee may do so). In addition, it

would have adverse consequences for the Debtor and the administration of the estate. If any individual creditor or other party in interest could file such motions, the Debtor might well be subjected to duplicative or even inconsistent requests for relief. Moreover, as the Trustee points out, she would have the duty to account for such property. Trustees ought not to have to be responsible for accounting for and administering property unless they have exercised their own judgment and determined that administration of that property would be beneficial to the estate. Efficient administration of the estate requires that in matters like this, the estate speak with one voice.

In *Harrison v. Singer Asset Finance Company (In re Harrison)*, 314 B.R. 751 (B.A.P. 8th Cir. 2004), the Eighth Circuit Bankruptcy Appellate Panel addressed a similar question – whether a debtor had standing to initiate an adversary proceeding asserting claims which belonged to the debtor prepetition, but which upon filing became property of the estate. The lower court had dismissed the adversary proceeding on motion of the defendant. The debtor argued on appeal that he had derivative standing, because the trustee had failed to act. The appellate court rejected the debtor’s position for two reasons. First, the court observed that ordinarily the debtor has no power to act independently of the trustee in pursuing claims that belong to the estate. *See Mixon v. Anderson (In re Ozark Restaurant Equipment Company)*, 816 F.2d 1222, 1225 (8th Cir.) (causes of action belonging to debtor at commencement of case passed to trustee to assert), *cert. denied sub nom., Jacoway v. Anderson*, 484 U.S. 848 (1987); *Cable v. Ivy Tech. State College*, 200 F.3d 467, 472 (7th Cir. 1999) (in liquidation proceedings, only the trustee has standing to prosecute or defend claim belonging to estate). Second, while the Court agreed that the debtor might be given the power to act on behalf of the estate if the trustee had unjustifiably refused to do so, the evidence did not support such a finding. The trustee in that case had secured counsel who

succeeded in setting aside a previous default judgment determining debtor had no right to the asset in question and was a party to a proceeding brought by another purported assignee. The same reasons which would deny standing to a debtor purporting to act on behalf of the estate with respect to property of the estate justify denying a motion brought by an individual creditor of the estate seeking similar relief.

In this case, if Ms. Wick has any power to act on behalf of the estate, it would be only derivatively and then only on motion requesting such authority after demonstrating that the trustee had unjustifiably refused to act. Her motion fails even to make such an allegation. No evidence was presented at the hearing which would justify such a finding, nor could it have been. The record in this case clearly shows that the Trustee has acted, as did the trustee in *Harrison*. Based on the information supplied by Ms. Wick, the Trustee took such actions as she deemed appropriate. Using that information, the Trustee, moved to reopen this case and filed a motion for a preliminary injunction seeking an order prohibiting the Debtor from disposing of any of the property described in the motion, withdrawing the latter motion only after securing assurances of counsel that the property would not be disposed of pending a determination of its status. The Trustee also filed the same motion now sponsored by Ms. Wick, a motion to compel the Debtor to turnover to the trustee certain property he was alleged to have had upon filing. The Trustee subsequently withdrew that motion, but only because after further investigation, including an inspection of property held by Debtor, she concluded that only the video camera and associated equipment had sufficient value to administer on behalf of the estate. That she has now done, having sold the camera and equipment to Mr. Batton for \$3,200. Accordingly, there would be no justification for granting Ms. Wick or any other party authority to revisit this question and tread the same ground again.

For all of these reasons, the Court holds that Ms. Wick has no standing to prosecute the

Motion. Ms. Wick has failed to demonstrate that she is a creditor or otherwise a party in interest in this case. However, even if she were a creditor, she would not in that capacity have standing to file a motion to compel Debtor to turn over property of the estate to the Trustee. Ordinarily, the right to bring such a motion belongs exclusively to the trustee as the representative of the estate. While a creditor or other party in interest might be given the right to bring such action on behalf of the estate if the trustee unjustifiably refuses to do so, Ms. Wick failed both to make any such allegations in her Motion and to present evidence justifying such a finding at the hearing.

A separate order will be entered on the Motion as required by Rule 9021.

/s/ Dennis R. Dow
Bankruptcy Judge

Date: _____

Copies to:
Diana Long
Van Adams
Janice Harder